

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**KENNEDY MINNIFIELD,**  
**Petitioner,**

**v.**

**GRANT CULLIVER,**  
**Respondent.**

)  
)  
)  
)  
)  
)  
)

**CIVIL ACTION NO. 09-0529-KD-N**

**ORDER**

After due and proper consideration of all pleadings in this file, and a review of the additional evidentiary materials (Docs. 14, 15) submitted by petitioner following entry of the Report and Recommendation, the Report and Recommendation of the Magistrate Judge made under 28 U.S.C. § 636 and dated March 17, 2010 is **ADOPTED** as the opinion of this Court.

Petitioner's affidavit and assorted state court records raise the fact that there was no blood or DNA evidence found at the crime scene; he offers this apparently in furtherance of an "actual innocence" exception to the limitations period. However, the lack of evidence presented at trial is not new and is not evidence. As the state court found, the jury based its verdict on eyewitness and other evidence. The lack of certain kinds of evidence does not render the petition timely and does not alter the Court's reasoning.

Accordingly, it is **ORDERED** that the instant action is **DISMISSED** with prejudice and that all pending motions are **DENIED** as **MOOT**. A certificate of appealability shall not issue.

**DONE** and **ORDERED** this the 15<sup>th</sup> day of **April 2010**.

/s/ Kristi K. DuBose

**KRISTI K. DUBOSE**

**UNITED STATES DISTRICT JUDGE**